

STATEMENT OF PROFESSOR JONATHAN TURLEY ON THE FEDERAL LAWSUIT BY SENIOR PILOTS

The Fair Treatment for Experienced Pilots Act, recently signed into law as Pub. L. No. 110-135, will be challenged on a variety of grounds. Due to poor drafting and clearly unconstitutional components, the law, signed into law on December 13, 2007, presents something of a target rich environment.

Pilots will seek declaratory and injunctive relief under the Declaratory Judgment Act, 18 U.S.C. 2001 et seq. If successful, the law will be declared null and void.

The Act specifically mandates that flights with a pilot in command over age 60 must have a pilot who has not yet reached age 60 assigned to the flight deck crew. It further mandates that any person who turned age 60 prior to December 13, 2007 cannot serve as a pilot unless the carrier treats the person as a new hire pilot. It denies meaningful relief to our clients. The new law is poorly written and expressly denies carriers the right to treat older pilots fairly, even countermanding prior contractual positions between pilots and their companies.

The specific unlawful provisions include the nonretroactivity provision that states:

- 1) NONRETROACTIVITY- No person who has attained 60 years of age before the date of enactment of this section may serve as a pilot for an air carrier engaged in covered operations unless--
 - (A) such person is in the employment of that air carrier in such operations on such date of enactment as a required flight deck crew member; or
 - (B) such person is newly hired by an air carrier as a pilot on or after such date of enactment without credit for prior seniority or prior longevity for benefits or other terms related to length of service prior to the date of rehire under any labor agreement or employment policies of the air carrier.

This provision effectively bars private parties from contracting on employment conditions and negates past benefits of pilots not employed at the time of enactment.

Another flawed provision concerns immunity.

(2) PROTECTION FOR COMPLIANCE- An action taken in conformance with this section, taken in conformance with a regulation issued to carry out this section, or taken prior to the date of enactment of this section in conformance with section 121.383(c) of title 14, Code of Federal Regulations (as in effect before such date of enactment), may not serve as a basis for liability or relief in a proceeding, brought under any employment law or regulation, before any court or agency of the United States or of any State or locality.

This provision would appear to wipe out any claims of senior pilots in the courts. Indeed, the government has asked me to withdraw our various cases before the D.C. Circuit on the basis of this provision. I have declined on the basis that the law is unconstitutional and unenforceable.

The law further imposes additional requirements on pilots based on their age without any factual support or individualized review. While the Medical Standards and Records section requires studies before “different medical standards” are imposed “on account of age,” the law imposes a specific first-class medical certificate on the basis of age after six months from the date of enactment. It further imposes special line evaluations on pilots older than 60 years.

In my view, the law can be challenged in federal court on a number of grounds, including but not limited to the violation of the Equal Protection Clause, the Due Process Clause, Bill of Attainder Clause, the Takings Clause, and the interference with the right to contract. There are also issues of vagueness and conflicts with statutory prohibitions on age discrimination. While this will present a novel and therefore uncertain challenge, I believe that we have very credible claims to make to a federal court.

We appear to have a compelling basis for standing with a mix of senior pilots, air carriers, and organizations. I also expect that we can secure amicus support from the trial lawyers, AARP, veteran’s groups and others.

While the Congress is increasingly bestowing immunity on favored parties, this bill is different. It effectively destroys the past seniority of pilots, negates their contractual understandings, and even binds companies in their ability to deal fairly with pilots.

I litigate regularly against the government and view this as an extremely promising action. In one such case, I was counsel in the successful challenge to

the Elizabeth Morgan Act. That litigation explored whether Congress had the authority to enact the law, which negated the prior rights of a class of parents. We argued that the bill was a rare example of a “bill of attainder” under Sections 9 and 10 of Article I. While it took years, the bill was struck down as a bill of attainder by the Court of Appeals for the District of Columbia. *See Foretich v. United States*, 351 F.3d 1198, 1226 (D.C. Cir. 2003).

A declaratory judgment action can lead to a bill being struck down, but it does not generally involve damages for individuals but we are exploring possible claims or filings that might allow for such relief. This includes lawsuit against private companies for such relief.

Obviously, the best outcome would be a legislative fix. This law seems almost casual, if not conversational, in its language. Congress clearly enacted this law with little understanding of its implications or inevitable litigation. If struck in this lawsuit, the Act will cause further confusion and chaos as courts force companies to reverse measures implemented after its enactment. The first step, however, is to seek judicial relief. If legislative relief comes, it would be welcomed. Otherwise, we can seek our remedies from the courts.